United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

75-7318

B

United States Court of Appeals

FOR THE SECOND CIRCUIT

P/S

DOMINICK PAMPILLONIA,
Plaintiff,

against

CONCORD LINE, A/S,
Defendant and Third-Party Plaintiff-Appellee,

against

COURT CARPENTRY AND MARINE CONTRACTING CO.,
Third-Party Defendant-Appellant,

and

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Third-Party Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF OF THIRD-PARTY DEFENDANT-APPELLANT

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Statement

This reply brief is being filed because the shipowner's brief incorrectly sets forth the law and evidence which it claims supports the judgment of the court below awarding

indemnity. While the brief is replete with many inaccuracies, appellant proposes to point out only the major ones to demonstrate that what is stated in the shipowner's brief is not what the record shows or the decisions hold.

POINT I

The shipowner's interpretation of the evidence is not supported by the record in this case.

One of the more graphic illustrations of the inaccuracies in the shipowner's brief involves what the shipowner claims is evidence which sustains the finding that appellant C.C. Lumber did lashing work in the area in question prior to plaintiff's accident and that the trial court therefore could reasonably infer therefrom that in doing this work employees of C.C. Lumber placed or dropped grease on the deck and that this was what caused the plaintiff to slip and fall. In support of this the shipowner relies on certain photographs, which were taken by an unidentified photographer, identified by the vessel's Chief Officer Nielsen, and received in evidence as a "fair representation of that hatch as it existed on April 3, 1969 at approximately 3:00". In its brief the shipowner repeatedly referred to these photographs as having been taken "shortly" after the plaintiff's accident. No attempt, however, was made by the shipowner either at the time the photographs were offered in evidence or at any other time to establish when the photographs were taken.

On cross-examination Chief Officer Nielsen admitted that he was not present when the photographs were taken and conceded that he did not know when they were taken. His testimony concerning when the photographs were taken indicates a time of approximately 4:30 P.M. (131, 132), or almost some two hours, more or less, after the accident (8). Though it is suggested that the Court accept these photographs as evidence that lashing work had been done

by the marine carpenters prior to the plaintiff's accident, Chief Officer Nielsen also testified that he had no clear recollection whether the lashings shown in Exhibit T-5 were on or not at the time of the plaintiff's accident; and conceded that since the lashing wires did obstruct the passageway and he would have had to step over them to get to the scene of the plaintiff's accident, he would have recalled the n if they had been on. (132-133). As a matter of fact, Chief Officer Nielsen on his direct examination testified that the gas cylinders which are shown to be lashed in the photographs were being loaded and being cribbed or boxed at the time of the accident. (118). The cribbing or boxing of the cargo had not been started when Chief Officer Nielsen arrived on the scene of the plaintiff's accident at approximately 3:00. (129).

Similar tactics are employed to convert what Captain Wheeler said into testimony that it was the custom in the Port of New York to use grease in lashing cargo. At page 5 of its brief the shipowner asserts that Captain Wheeler "stated that it was the custom in New York and indeed throughout the world, to use grease on the threaded elements of lashing components." At page 8 of its brief the shipowner asserts that Captain Wheeler "stated *not only* that it was the custom in the Port of New York to use grease in lashing cargo, *but that* grease was necessary to the lashing process." (Emphasis supplied.) At pages 13 and 14 of its brief the shipowner argues that Captain Wheeler's response to shipowner's counsel's question as to whether grease was a necessary product in lashing work, coupled with the Court's comments in response to an objection, converted Captain Wheeler's testimony into testimony as to custom and practice. At page 15, however, the shipowner asserts that the use of the word "necessary" by Captain Wheeler constituted more than testimony as to custom and usage but rather was a description, by definition, of the manner in which a maritime carpentry function is performed. The shipowner then urges that the manner

in which a maritime carpentry function is performed is entitled to greater weight and is sufficient to prove that in fact on April 3, 1969, employees of C.C. Lumber used grease in lashing cargo at No. 5 hatch and that some of that grease was the ultimate cause of plaintiff's accident. In support thereof it cites a number of cases, none of which support such a proposition. Obviously, a definition of the manner in which a function is performed is not evidence that it was performed on a particular occasion, nor that it was carelessly performed, or that it caused the plaintiff's accident.

At pages 14 and 15, though tacitly conceding that Captain Wheeler never actually testified that he saw employees of C.C. Lumber using grease in their lashing work, the shipowner urges that because Captain Wheeler did testify that he had seen grease properly applied to deck lashings on ships that he was aboard and had been on ships on which lashers in the employ of C.C. Lumber were working on approximately 100 occasions, it can be properly inferred that the instances when lashers in the employ of C.C. Lumber were on board ships on which he was on were included in the occasions when he saw lashing being performed with the use of grease. Of course Captain Wheeler testified that he did not take note to count on how many occasions he saw employees of C.C. Lumber doing lashing, if any. (231). Furthermore, Capt. Wheeler did not testify that he had seen grease applied to deck lashings *on many occasions* during the years when he was covering 66 ships a month. (Emphasis supplied.) All that Captain Wheeler testified to was that during these years he saw grease properly applied to deck lashings on ships that I was aboard". (231). To say as the shipowner does that Capt. Wheeler testified that he had seen grease applied to deck lashings on many occasions, is to misstate this witness's testimony. To urge as the shipowner does that the occasions on which lashers in the employ of C.C. Lumber were on board ships on which he was on included this

period when Capt. Wheeler covered as much as 66 ships a month, is to strain the evidence beyond all reason. To say that such testimony supports a finding of the doing of an act at a particular time which is the subject of a habit or custom, finds no support in any decision including those cited by the shipowner in its brief.

Finally, in its brief the shipowner persists in repeating that the plaintiff also claimed that he fell as a result of stepping on a "slippery substance". Plaintiff never testified that he fell as a result of a slippery substance. His only testimony was that he fell in grease. At page 4 of its brief, the shipowner asserts that the plaintiff described the substance which caused him to slip and fall as 'dark, oily". This description was given in response to a question by shipowner's counsel to give a description of the color of the grease on which plaintiff claimed he slipped. (36).

The testimony by Capt. Wheeler about the material which might have accumulated on the saw has no relevance to the action, is inconsistent with the jury's finding and contrary to all of the evidence in this case including the testimony of the vessel's own Chief Mate. In the course of this witness's cross-examination the Court asked, "Did you see grease when you saw that spot as distinguished from oil?" and Chief Officer Nielsen answered: "It looked to me like grease."

POINT II

The shipowner incorrectly inteprets the applicable legal principles.

At page 16 of its brief the shipowner advances the rather strange argument that because appellant produced no evidence of its own custom and practice or lack thereof, the relevance of *McClellan* v. *Pennsylvania R. Co.*, 62 F.2d 61 (2 Cir., 1932); *Tropea* v. *Shell Oil Company*, 307 F.2d 757 (2 Cir., 1962) and *United States Shipping Board E.F.*

Corp. v. *Levensaler,* 290 F.297 (D.C. Cir., 1923) cert. den. 266 U.S. 630 (1924) is "irreparably emasculated". None of these cases even intimate that both sides are obligated to offer testimony as to custom and practice. The burden is on the party seeking to establish custom and practice and the shipowner has failed to sustain that burden as Point I of the appellant's brief shows.

The shipowner seeks to dismiss *Federal Reserve Bank* v. *Molloy,* 264 U.S. 160 (1924) by stating that in the instant case there was no testimony that it was the custom and practice in the industry to use grease or oil in the lashing of cargo. As the Court pointed out in *United States Shipping Board E.F. Corp.* v. *Levensaler,* 290 F. 297, 301-302 (D.C. Cir., 1923) cert. den. 266 U.S. 630 (1924), a custom cannot be found to exist if there are other methods of doing a thing.

Ignatyuk v. *Tramp Chartering Corp.,* 250 F.2d 198 (2 Cir., 1957) is sought to be dismissed on the ground that that case involved a latent defect. A reading of that case, however, discloses that the alleged defect was not latent. As the Court noted, there was no dispute that there was no duty to discover a latent defect. The question in that case involved a condition which was patent but not discoverable on a cursory examination.

The shipowner's reliance on *Gallick* v. *Baltimore & Ohio R.R. Co.,* 372 U.S. 108 (1963), is misplaced. That case, as this Court noted in *Traupman* v. *American Dredging Company,* 470 F.2d 736, 738, involved a F.E.L.A. case in which the United States Supreme Court held that a jury was allowed to speculate on the connection between the defendant's admitted negligent act and the plaintiff's injury. It does not permit inferences to be drawn when there is nothing on which to base them or on a misinterpretation of the evidence.

Finally, insofar as the Safety and Health Regulations for Longshoring are concerned, while they place certain

responsibilities on the employer, they do not give either the shipowner or anyone else any right to recover damage by reason thereof. In each of the cases cited by the shipowner the rule is that notice is a prerequisite to the awarding of indemnity whether Safety Regulations are involved or not. Even *Dowding* v. *Compagnie Fabre Societe Generale*, 1971 A.M.C. 1498, 1500 (N.D. Ill., 1971), so holds. The sentence immediately preceding the portion of the opinion which is quoted at page 26 of the shipowner's brief states clearly and unequivocally:

> "Failure to correct a *known* unseaworthy condition constitutes a breach of such warranty." (Emphasis supplied.)

Conclusion

The judgment which has been entered herein against C.C. Lumber in favor of Concord Line, together with costs, disbursements and counsel fees, should be vacated and set aside and the third-party complaint dismissed and judgment entered in favor of C.C. Lumber with costs and disbursements.

Respectfully submitted,

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Form No. 2-Affidavit.
H.15

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State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON being duly sworn, deposes and says that he is over the age of 18 years. That on the 20th day of August, 1975, he served two copies of the Reply Brief of Third-Party Defendant-Appellant on the attorneys for the Third-Party Plaintiff-Appellee Haight, Gardner Poor & Havens, Esqs. by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York, directed to said attorneys at No. One State Street Plaza, New York ( ) N. Y., that being the address designated by them for that purpose upon the preceding papers in this action.

David F. Wilson

Sworn to before me this

20th day of August, 1975.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976